

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

I-ENTERPRISE COMPANY LLC,

No. C-03-1561 MMC

Plaintiffs,

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR PARTIAL DISMISSAL OF
FOURTH AMENDED COMPLAINT;
VACATING HEARING**

v.

DRAPER FISHER JURVETSON
MANAGEMENT COMPANY V, LLC, et al.,

(Docket No. 442)

Defendants

Before the Court is defendants' motion, filed September 26, 2005, for partial dismissal of plaintiff I-Enterprise Company LLC's ("I-Enterprise") Fourth Amended Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. I-Enterprise has filed opposition to the motion, to which defendants have replied. Having considered the papers submitted in support of and in opposition to the motion, the Court finds the matter appropriate for decision without oral argument, see Civil L.R. 7-1(b), and hereby VACATES the November 4, 2005 hearing. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

BACKGROUND

In 1998 and 1999, I-Enterprise, through its predecessors-in-interest, invested in two

1 venture capital funds, Draper Fisher Jurvetson Fund V L.P. (“Fund V”) and Draper Fisher
 2 Jurvetson Fund VI L.P. (“Fund VI”) (collectively, “the Funds”). (See Fourth Amended
 3 Complaint (“4AC”) ¶¶ 1, 4.) I-Enterprise alleges that it has suffered more than \$40 million
 4 in damages as a result of defendants’ fraudulent and negligent misrepresentations, breach
 5 of contract, breach of fiduciary duty, state securities law violations, unfair business
 6 practices, conversion, and unjust enrichment. (See id. ¶¶ 1, 3.)

7 Defendant Draper Fisher Jurvetson Management Company V, LLC (“DFJ-V”) is the
 8 general partner of Fund V. (See id. ¶ 5.) Defendant Draper Fisher Jurvetson Management
 9 Company VI, LLC (“DFJ-VI”) is the general partner of Fund VI. (See id. ¶ 6.) Defendants
 10 Timothy C. Draper (“Draper”), John H.N. Fisher (“Fisher”), and Stephen T. Jurvetson
 11 (“Jurvetson”) (collectively, “individual defendants”) are managing directors of DFJ-V and
 12 DFJ-VI. (See id. ¶¶ 7-9.) The individual defendants are also general partners in the
 13 Draper Fisher Jurvetson general partnership (“DFJ”). (See id.)

14 **LEGAL STANDARD**

15 A motion to dismiss under Rule 12(b)(6) cannot be granted unless “it appears
 16 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
 17 entitle him to relief.” See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Dismissal can be
 18 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
 19 under a cognizable legal theory. See Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699
 20 (9th Cir. 1990).

21 Generally, a district court, in ruling on a Rule 12(b)(6) motion, may not consider any
 22 material beyond the pleadings. See Hal Roach Studios, Inc. v. Richard Feiner And Co.,
 23 Inc., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Material that is properly submitted as part
 24 of the complaint, however, may be considered. See id. Documents whose contents are
 25 alleged in the complaint, and whose authenticity no party questions, but which are not
 26 physically attached to the pleading, also may be considered. See Branch v. Tunnell, 14
 27 F.3d 449, 454 (9th Cir. 1994). In addition, the Court may consider any document “the
 28 authenticity of which is not contested, and upon which the plaintiff’s complaint necessarily

1 relies,” regardless of whether the document is referred to in the complaint. See Parrino v.
2 FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998). Finally, the Court may consider matters that
3 are subject to judicial notice. See Mack v. South Bay Beer Distributors, Inc., 798 F.2d
4 1279, 1282 (9th Cir. 1986).

5 In analyzing a motion to dismiss, the Court must accept as true all material
6 allegations in the complaint, and construe them in the light most favorable to the
7 nonmoving party. See NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
8 The Court may disregard factual allegations if such allegations are contradicted by the facts
9 established by reference to exhibits attached to the complaint. See Durning v. First Boston
10 Corp., 815 F.2d 1265, 1267 (9th Cir. 1987). Conclusory allegations, unsupported by the
11 facts alleged, need not be accepted as true. See Holden v. Hagopian, 978 F.2d 1115,
12 1121 (9th Cir. 1992).

13 DISCUSSION

14 A. Conversion Claim

15 I-Enterprise, in its opposition, notes that the Court previously has dismissed
16 I-Enterprise’s claim for conversion against DFJ-V, and states it has realleged the claim in
17 the Fourth Amended Complaint solely to preserve the issue for appeal.

18 Accordingly, as I-Enterprise is no longer asserting a conversion claim, defendants’
19 motion to dismiss the conversion claim will be DENIED as moot.

20 B. Unjust Enrichment

21 Defendants move to dismiss I-Enterprise’s unjust enrichment claims, on the ground
22 the Court previously dismissed those claims as improperly alleged derivative claims.

23 Contrary to defendants’ assertion, the Court dismissed the unjust enrichment claims,
24 among other claims, only to the extent they were based on “(1) failure to make the requisite
25 capital contributions to the partnerships, (2) failure to adhere to the investment objectives
26 set forth in the Offering Memoranda, (3) misallocations of profits, losses, and securities, (4)
27 failure to devote appropriate time to management of the funds, and (5) conflict of interest
28 and self-dealing.” (See Order Granting in Part and Denying in Part Counterdefendants’

1 Motion for Partial Judgment On the Pleadings, or in the Alternative, for Summary
2 Adjudication, filed December 15, 2004, ("December 2004 Order") at 3-4, 19.) I-Enterprise's
3 current claims for unjust enrichment are not so limited in scope. (See 4AC ¶¶ 208-214,
4 276-282.) For example, I-Enterprise alleges, in support of its unjust enrichment claims, that
5 it is entitled to restitution of its contributions to Funds V and VI on the ground defendants
6 made misrepresentations to induce I-Enterprise's investment in those Funds. (See id.)
7 Any such alleged misrepresentations were not addressed in the Court's December 2004
8 Order, (see December 2004 Order at 4), and defendants, in their instant motion, set forth
9 no argument in support of dismissal of the unjust enrichment claims to the extent such
10 claims are based on allegations not addressed in the December 2004 Order.

11 Accordingly, defendants' motion to dismiss the unjust enrichment claims will be
12 DENIED.

13
14 **C. Breach of Contract, Breach of Fiduciary Duty, and Breach of the
Covenant of Good Faith and Fair Dealing**

15 Defendants contend that I-Enterprise's claims for breach of contract, breach of
16 fiduciary duty, and breach of the covenant of good faith and fair dealing ("Breach Claims")
17 should be dismissed in their entirety, except to the extent such claims are based on
18 defendants' failure to notify I-Enterprise of certain "detrimental acts," asserting the Court
19 has already ruled to that effect in its prior orders.

20 Although defendants correctly note that the Court previously denied defendants'
21 motion to dismiss the Breach Claims to the extent such claims are based on allegations
22 that defendants failed to provide notice of "detrimental acts," (see Order Granting in Part
23 and Denying in Part Defendants' Motion to Dismiss Certain Counts of Third Amended
24 Complaint and/or to Strike, filed July 15, 2005, ("July 2005 Order") at 9), the Court has
25 never held the Breach Claims are limited to that theory. Indeed, in the December 2004
26 Order, the Court expressly held the Breach Claims were not dismissed to the extent they
27 were based on allegations that defendants failed to distribute securities to I-Enterprise and
28 failed to provide notice to I-Enterprise that the individual defendants ceased being active in

1 the management of the Funds.¹ (See id. at 15-17.)

2 Accordingly, defendants' motion to dismiss all Breach Claims that are not based on
3 the allegation that defendants failed to provide notice of "detrimental acts" will be DENIED.

4 **D. Claims Based on Failure to Devote an Objectively Adequate Amount of**
5 **Time to Management of the Funds**

6 Defendants move to dismiss any remaining claim that is based on defendants'
7 failure to devote an objectively adequate amount of time to management of the Funds.

8 Defendants correctly note that, in the December 2004 Order, the Court, to the extent
9 raised at that time by defendants' motion,² dismissed all claims that were based on a failure
10 to devote appropriate time to management of the Funds, on the ground such claims were
11 improperly alleged derivative claims.³ (See December 2004 Order at 3-4, 16-18, 21.)

12 Additionally, as defendants note, the Court, in the July 2005 Order, dismissed I-Enterprise's
13 negligent misrepresentation claims to the extent such claims were based on
14 misrepresentations about the amount of time defendants promised to devote to the
15 management of the Funds. The Court found no misrepresentation was made because
16 each defendant promised, in the Fund V and Fund VI Limited Partnership Agreements, only

17
18 ¹ In the December 2004 Order, the Court dismissed the Breach Claims only to the
19 extent they were based on "(1) failure to make the requisite capital contributions to the
20 partnerships, (2) failure to adhere to the investment objectives set forth in the Offering
21 Memoranda, (3) misallocations of profits, losses, and securities, (4) failure to devote
appropriate time to management of the funds, and (5) conflict of interest and self-dealing."
(See December 2004 Order at 3-4, 19.) To the extent I-Enterprise realleges the Breach
Claims based on those allegations, the Court's December 2004 Order remains applicable.

22 ² I-Enterprise's claims for negligent misrepresentation, fraud, violation of
23 Massachusetts Blue Sky Laws, and for an accounting were not addressed in that order, as
defendants had not moved to dismiss such claims at that time.

24 ³ Although in footnote 9 of the July 2005 Order, the Court stated that it "expresse[d]
25 no opinion as to whether defendants . . . could have breached the implied covenant of good
26 faith and fair dealing by failing to devote an objectively adequate amount of time to
managing the Funds," (see July 2005 Order at 20 n.9), the Court later noted, in its
27 September 12, 2005 order denying defendants' motion for clarification of the July 2005
order, the reason the Court did not address that issue, was that defendants had moved to
28 dismiss only the negligent misrepresentation claim. (See Order Denying Defendants'
Motion for Clarification, filed September 12, 2005, at 3.) The Court did not purport in
footnote 9 of the July 2005 Order to set aside its earlier ruling.

1 to “devote so much of his time to the conduct of the affairs of the Partnership and the
2 General Partner as is appropriate in his judgment to manage effectively the affairs of the
3 Partnership” and disclosed therein the existence of commitments to other entities. (See
4 July 2005 Order at 19-21.) Defendants now move to dismiss I-Enterprise’s claims that
5 were not addressed in the December 2004 and July 2005 orders, specifically, the claims for
6 fraud, violation of the California and Massachusetts Blue Sky Laws, and for an accounting,
7 to the extent such claims are based on defendants’ alleged failure to devote an adequate
8 amount of time to managing the Funds.

9 The Court agrees with defendants that its prior ruling, specifically, that I-Enterprise
10 failed to state a claim for negligent misrepresentation based on statements about the
11 amount of time defendants would devote to the management of the Funds, (see July 2005
12 Order at 19-21), likewise requires dismissal of I-Enterprise’s claims for fraud, violation of
13 California and Massachusetts Blue Sky Laws, and for an accounting, to the extent such
14 claims are based on the same statements, because an element of each such claim is the
15 existence of a misrepresentation or omission. See, e.g., Small v. Fritz Companies, Inc., 30
16 Cal. 4th 167, 173 (2003) (noting one element of claim for negligent misrepresentation is
17 “misrepresentation (false representation, concealment, or nondisclosure”); Lazar v.
18 Superior Court, 12 Cal. 4th 631, 638 (1996) (noting one element of fraud claim is
19 “misrepresentation (false representation, concealment, or nondisclosure”); Cal. Corp.
20 Code § 25401 (providing claim for violation of California Blue Sky Law requires proof of
21 untrue statement of material fact or material omission); Mass. Gen. Laws, ch. 110A,
22 § 410(a)(2) (providing claim for violation of Massachusetts Blue Sky Laws requires proof of
23 untrue statement of material fact or material omission); Union Bank v. Superior Court, 31
24 Cal. App. 4th 573, 593 (1995) (stating absence of proof of misconduct bars action for
25 accounting).

26 Defendants also move to dismiss I-Enterprise’s contract claim, to the extent such
27 claim is based on a failure to disclose that the individual defendants had ceased being
28 active in the management of the Funds. As noted above, the Court held, in the December

1 2004 Order, that such claim was a direct claim, not a derivative claim, and thus not subject
2 to dismissal as an improperly alleged derivative claim. (See December 2004 Order at 17-
3 18.) As the Court later held, however, I-Enterprise does not allege that any of the individual
4 defendants ceased being active in the management of the Funds, but rather alleges only
5 that they failed to disclose other, then-existing commitments. (See July 2005 Order at 20;
6 see also 4AC ¶¶ 137-148.) Accordingly, as defendants correctly argue, I-Enterprise has
7 not stated a direct contract claim based on a failure to disclose that the individual
8 defendants had ceased being active in the management of the Funds.

9 Accordingly, defendants' motion to dismiss all claims that are based on defendants'
10 alleged failure to devote an objectively adequate amount of time to management of the
11 Funds, or on alleged misrepresentations about the amount of time defendants would
12 devote to the management of the Funds, will be GRANTED.

13 **E. Claims Based on Nondisclosure of Retention of Directed Shares and**
14 **"Inter-Fund Loans"**

15 In the July 2005 Order, the Court dismissed I-Enterprise's claim against DFJ-VI and
16 the individual defendants for negligent misrepresentation, to the extent such claim was
17 based on defendants' alleged failure to disclose retention of directed shares or a failure to
18 disclose what defendants characterize as "inter-fund loans." (See July 2005 Order at 21.)
19 The Court dismissed such claim, however, only because I-Enterprise had failed to address
20 the portion of defendants' motion to dismiss that was directed to such claim and, thus, had
21 effectively conceded that it was not pursuing a negligent misrepresentation claim based on
22 such allegations. (See id.) The Court did not address the allegations on their merits.

23 Defendants now move to dismiss I-Enterprise's claims for breach of fiduciary duty,
24 breach of the covenant of good faith and fair dealing, breach of contract, unjust enrichment,
25 violations of Blue Sky Laws, and for an accounting, to the extent such claims are based on
26 the above-referenced allegations. Defendants set forth two arguments in support of
27 dismissal of such claims: (1) such claims are derivative claims that cannot be asserted
28 without joining the Funds as parties to the instant action; and (2) plaintiffs cannot show they

1 suffered any damages as a result of such alleged nondisclosures.

2 The specific allegations at issue are the following:

3 164. The Fund VI General Partner and the Individual Defendants
4 failed to disclose that the Fund V General Partner had diverted Fund V
5 monies for non-Partnership purposes, including that the Fund V General
6 Partner in 1998 had used \$375,000 of Fund V monies to purchase shares of
7 Wit Capital for the Fund V side-by-side fund and in July 1999 had used \$1.59
8 million of Fund V monies to buy shares of Digital Impact for Fund IV.

9 165. The Fund VI General Partner and the Individual Defendants
10 failed to disclose that the General Partners of prior DFJ funds and the
11 Individual Defendants had misappropriated, and intended to continue to
12 misappropriate, compensation and benefits, including directed shares and
13 option grants, received on account of board memberships in prior fund
14 portfolio companies that should have been used to reduce management fees
15 under those funds' Agreements.

16 (See 4AC ¶¶ 164-65.) I-Enterprise further alleges that such omissions made the
17 statements in the Offering Memorandum for Fund VI materially misleading. (See id. ¶ 163.)
18 In essence, I-Enterprise alleges that DFJ-VI failed to disclose, in the Offering
19 Memorandum, that the managers of prior funds had misappropriated assets from those
20 funds.

21 Defendants' argument that any claims based on such nondisclosures are improperly
22 alleged derivative claims is unpersuasive. I-Enterprise does not allege in the above-cited
23 paragraphs, for example, that DFJ-VI is liable for misappropriation of Fund VI assets, a
24 claim that clearly would be derivative. (See, e.g., December 2004 Order at 5 (citing Jones
25 v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 106 (1969))). Rather, I-Enterprise alleges that, in
26 promoting Fund VI, DFJ-VI and the individual defendants are liable for failing to disclose
27 prior misappropriations of assets from other funds. In other words, I-Enterprise is not
28 seeking damages for an injury to the Funds, but is seeking damages for breach of a duty of
disclosure allegedly owed to I-Enterprise, individually, as a prospective investor. Such a
claim is a direct claim, not a derivative claim. (See December 2004 Order at 6 (citing
Jones, 1 Cal. 3d at 106)).

Defendants' alternative argument that I-Enterprise cannot show it incurred damages
as a result of the above-referenced nondisclosures likewise is unpersuasive. Defendants

1 argue that “for the same reasons that [I-Enterprise] was unable to identify any damages in
2 connection with these allegations to support its negligent misrepresentation claim,
3 [I-Enterprise] could not allege the requisite damages necessary” to support any other claim
4 based on such nondisclosures. (See Motion at 11.) Presumably, defendants are referring
5 to the argument made in their earlier-filed motion to dismiss the Third Amended Complaint,
6 in which defendants contended I-Enterprise had failed to allege that any “inter-fund loans”
7 were not repaid. (See Defendants’ Motion to Dismiss Certain Counts of IEC’s Third
8 Amended Complaint, filed April 25, 2005, at 19.) As noted above, the Court, in its July
9 2005 Order, never ruled on the merits of that argument; thus, there was no finding that
10 I-Enterprise had failed to properly allege damages. Moreover, I-Enterprise had no reason
11 to allege that the “loans” were not repaid, because it does not allege that the challenged
12 transactions were loans. As set forth above, I-Enterprise alleges that assets of the funds
13 were misappropriated for non-fund uses, not that defendants took unauthorized loans from
14 the funds. (See 4AC ¶¶ 164-165.). Defendants fail to set forth any other argument as to
15 why I-Enterprise has failed to adequately allege damages.

16 Accordingly, defendants’ motion to dismiss all claims that are based on an alleged
17 failure to disclose retention of directed shares and a failure to disclose what defendants
18 characterize as “inter-fund loans” will be DENIED.

19 CONCLUSION

20 For the reasons set forth above, defendants’ motion to dismiss is hereby GRANTED
21 in part and DENIED in part, as follows:

22 1. As I-Enterprise is no longer asserting a conversion claim, defendants’ motion to
23 dismiss the conversion claim is DENIED as moot.

24 2. Defendants’ motion to dismiss the unjust enrichment claims is DENIED.

25 3. Defendants’ motion to dismiss all Breach Claims that are not based on the
26 allegation that defendants failed to provide notice of “detrimental acts” is DENIED.

27 4. Defendants’ motion to dismiss all claims that are based on defendants’ failure to
28 devote an objectively adequate amount of time to management of the Funds or alleged

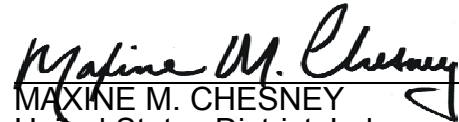
1 misrepresentations about the amount of time defendants would devote to the management
2 of the Funds is GRANTED.

3 5. Defendants' motion to dismiss all claims that are based on an alleged failure to
4 disclose retention of directed shares and a failure to disclose what defendants characterize
5 as "inter-fund loans" is DENIED.

6 This order terminates Docket No. 442.

7 **IT IS SO ORDERED.**

8 Dated: November 3, 2005


MAXINE M. CHESNEY
United States District Judge